

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE REGIONS MORGAN KEEGAN
SECURITIES, DERIVATIVE AND ERISA
LITIGATION

ELECTRONICALLY FILED

Case No.: 09-md-2009 SHM

THIS DOCUMENT RELATES TO:

*In re Regions Morgan Keegan Closed-End
Fund Litigation*

Master Case No.: 2:07-cv-02830-SHM-dkv

**MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF JOSEPH W.
GILMORE FOR (1) APPOINTMENT AS LEAD PLAINTIFF; AND (2) APPROVAL OF
LEAD PLAINTIFF'S CHOICE OF LEAD AND LIAISON COUNSEL**

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I. INTRODUCTION

This securities class action has been brought pursuant to Sections 10(b) and Section 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), and Rule 10b-5 promulgated thereunder, and Sections 11, 12(a)(2) and 15 of the Securities Act of 1933 (15 U.S.C. §§ 77k, 77l and 77o) (the “Securities Act”) on behalf of persons who purchased shares of the following Regions Morgan Keegan closed-end mutual funds: RMK Advantage Income Fund (“RMA Fund”), RMK Strategic Income Fund (“RSF Fund”), RMK High Income Fund (“RMH Fund”), and RMK Multi-Sector High Income Fund (“RHY Fund”) (collectively, the “Closed-End Funds”).

Joseph W. Gilmore (“Mr. Gilmore”) suffered losses of approximately \$438,796 as a result of the purchase of shares of certain of the Closed-End Funds during the period between December 6, 2004 and July 14, 2009 (“Class Period”),¹ and respectfully submits the Memorandum of Law in support of his motion: (1) to be appointed lead plaintiff; and (2) for approval of his choice of Lead Counsel and Liaison Counsel. *See* Mr. Gilmore’s Declaration attached as Exhibit A to the Declaration of Charles Wesley Fowler, dated July 2, 2010

¹ The Class Period referred to herein is the longest possible class period based on the cases that have been filed concerning Closed-End Funds, some of which have already been consolidated under the caption *In re Regions Morgan Keegan Closed-End Fund Litig.*, No. 2:07-cv-02830 (SMH) (hereinafter “Closed-End Fund Litigation”). *See* Docket Entry No. 94 (the “September 23, 2008 Order”). For purposes of determining which lead plaintiff movant has the “largest financial interest,” courts often use the most inclusive class period and select as lead plaintiff the movant with the largest financial interest under that class period. *See, e.g., In re Doral Fin. Corp. Sec. Litig.*, 414 F. Supp. 2d 398, 402-03 (S.D.N.Y. 2006) (“For the purpose of determining lead plaintiff, I find that the use of the longer, most inclusive class period . . . is proper, as it encompasses more potential class members . . .”).

The earliest class period begins on December 6, 2004. *See Gregory v. Morgan Keegan & Co., Inc.*, No. 08-cv-02078 (W.D. Tenn. filed Feb. 6, 2008) and *Jones v. Morgan Keegan & Co., Inc.*, No. 10-cv-02248 (W.D. Tenn. filed Apr. 8, 2010). The latest class period ends on July 14, 2009. *See Hayne Palmour III v. Morgan Keegan & Co., Inc.*, No. 2:10-cv-02830 (W.D. Tenn. filed May 19, 2010). Thus, the longest possible class period would start on December 6, 2004 and end on July 14, 2009.

(hereinafter “Fowler Decl. Ex. __”); and Fowler Decl. Ex. B for a chart of estimated losses sustained by Mr. Gilmore in certain of the Closed-End Funds.²

Mr. Gilmore believes that he has the largest financial interest of any movant. As set forth below, Mr. Gilmore requests appointment as Lead Plaintiff and requests appointment of the law firm of Kaplan Fox & Kilsheimer LLP (“Kaplan Fox”) as Lead Counsel and The Fowler Law Firm as Liaison Counsel.

II. PROCEDURAL BACKGROUND AND SUMMARY OF THE PENDING ACTION ON BEHALF OF PURCHASERS OF THE CLOSED-END FUNDS

As explained in detail in the September 23, 2008 Order, from December 6, 2007 through April 4, 2008, a number of class actions were filed on behalf investors in closed-end and open-end funds offered by Morgan Keegan. The September 23, 2008 Order discussed, among other things, the nature of the class actions and summarized the named defendants in each of the filed putative class actions. Pursuant to the September 23, 2008 Order, the Court consolidated the two actions filed on behalf of purchasers of the Closed-End Funds and the claims asserted on behalf of investors in the RHY Fund that were included in other actions filed on behalf of open-end fund purchasers.³ The September 23, 2008 Order further provided that the notice of the pending Closed-End Fund Litigation be re-published to inform investors that they would have sixty days from the date of the notice to move the Court to be appointed as lead plaintiff. To Mr. Gilmore’s counsel’s knowledge, notice was not re-published with respect to the Closed-End

² As noted in his Declaration, Mr. Gilmore purchased shares of the RSF Fund, the RMA Fund, and the RMH Fund during the Class Period. *See* Fowler Decl. Ex. A.

³ The cases styled *Gregory v. Morgan Keegan & Co., Inc.*, No. 08-cv-02078 (W.D. Tenn. filed Feb. 6, 2008) and *DeJoseph v. Morgan Keegan & Co., Inc.*, No. 08-cv-02212 (W.D. Tenn. filed Apr. 4, 2008) were brought on behalf of purchasers of Morgan Keegan closed-end funds. The cases styled *Willis v. Morgan Keegan & Co., Inc.*, No. 07-cv-02830 (W.D. Tenn. filed Dec. 21, 2007) and *Hartman v. Morgan Keegan & Co., Inc.*, No. 08-cv-02071 (W.D. Tenn. filed Feb. 4, 2008) included claims asserted on behalf of purchasers of the RHY fund. Two more recently filed cases, *Jones v. Morgan Keegan & Co., Inc.*, No. 10-cv-02248 (W.D. Tenn. filed Apr. 8, 2010) and *Hayne Palmour III v. Morgan Keegan & Co., Inc.*, No. 2:10-cv-02830 (W.D. Tenn. filed May 19, 2010) should now also be consolidated with the Closed-End Fund Litigation pursuant to the September 23, 2008 Order at p. 39.

Fund Litigation until April 28, 2010.

On April 28, 2010, counsel for the plaintiffs in *Jones v. Morgan Keegan & Co., Inc.*, No. 10-cv-02248 (W.D. Tenn. filed Apr. 8, 2010) published a notice in *Investors Business Daily* to purchasers of the Closed-End Funds, advising potential class members of their right to move the court to be appointed lead plaintiff within 60 days of publication of the notice (Fowler Decl. Ex. C). Subsequently, in an order dated June 2, 2010 (Docket No. 158), this Court stated that all parties interested in serving as lead plaintiff for the Closed-End Fund Litigation have until July 2, 2010 to request appointment as lead plaintiff.

Mr. Gilmore now timely moves this Court to appoint him as lead plaintiff to represent the purchasers of shares of the Closed-End Funds in the Closed-End Fund Litigation.

III. ARGUMENT

B. Mr. Gilmore Should Be Appointed Lead Plaintiff

1. Mr. Gilmore Believes He Has the Largest Financial Interest in the Relief Sought by the Closed-End Fund Class

The Private Securities Litigation Reform Act (“PSLRA”) sets forth the procedure for the selection of lead plaintiff in “each private action arising under [the securities laws] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.” Section 27(a)(3)(A)(i) of the Securities Act provides that within twenty days after the date on which a class action is filed:

the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class –

(I) of the pendency of the action, the claims asserted therein, and the purported class period; and

(II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

15 U.S.C. § 77z-1(a)(3)(A)(i).⁴

Further, Section 27(a)(3)(B) directs the Court to consider any motions by a plaintiff or purported class member to serve as lead plaintiff in response to any such notice within ninety days after the date of publication of the notice pursuant to Section 27(a), or as soon as practicable after the court decides any pending motion to consolidate any actions asserting substantially the same claim or claims.

Under these sections of the Securities Act, the court “shall” adopt a presumption that the most adequate plaintiff is the applicant that:

- (aa) has either filed the complaint or made a motion in response to a notice...;
- (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
- (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. § 77z-1(a)(3)(B)(iii)(I); *Albert Fadem Trust v. Citigroup Inc.*, 239 F. Supp. 2d 344, 347 (S.D.N.Y. 2002).

Thus, the statutory language explicitly provides that the movant with “the largest financial interest” is entitled to presumptive appointment as lead plaintiff. 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I). The presumption may be rebutted only upon proof by a class member that the presumptively most adequate plaintiff “will not fairly and adequately protect the interests of the class” or “is subject to unique defenses that render such plaintiff incapable of adequately representing the class.” 15 U.S.C. § 77z-1(a)(3)(B)(iii)(II); *see* September 23, 2008 Order at 25;

⁴ Note that the PSLRA amended both the Securities Act and the Exchange Act and that the provisions regarding the appointment of lead plaintiff are substantially similar. For ease of reference, throughout the brief, citations are to the PSLRA provisions set forth in the Securities Act.

see also In re Am. Serv. Group, Inc., No. 3:06-00323, 2006 U.S. Dist. LEXIS 61799, at *7-8 (M.D. Tenn. Aug. 28, 2006).

Mr. Gilmore has estimated losses in certain Closed-End Funds of approximately \$438,796. *See* Fowler Decl. Ex. B. Therefore, Mr. Gilmore presently believes that he has the largest financial interest of any lead plaintiff movant that purchased shares of the Closed-End Funds and is presumptively entitled to appointment as the lead plaintiff to represent the proposed Closed-End Fund Class.

2. Mr. Gilmore Is Qualified Under Rule 23

The PSLRA provides that, in addition to possessing the largest financial interest, the lead plaintiff must also “otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure.” *See* 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I)(cc); *Albert Fadem Trust*, 239 F. Supp. 2d at 347; *In re Olsten Corp. Sec. Litig.*, 3 F. Supp. 2d 286, 294 (E.D.N.Y. 1998).

Rule 23 (a) provides that a party may serve as a class representative if the following four requirements are satisfied:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Of the four prerequisites to class certification, only two – typicality and adequacy – directly address the personal characteristics of the class representative. Consequently, in deciding a motion to serve as lead plaintiff, the Court should limit its inquiry to the typicality and adequacy prongs of Rule 23(a), and defer examination of the remaining requirements until the lead plaintiff moves for class certification. *See In re Symbol Techs., Inc. Sec. Litig.*, No. 05-CV-3923, 2006 U.S. Dist. LEXIS 24776, at *6 (E.D.N.Y. Apr. 26, 2006); *In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 49 (S.D.N.Y. 1998). As detailed below, Mr. Gilmore satisfies the

typicality and adequacy requirements of Rule 23(a) and is qualified to serve as lead plaintiff of the Closed-End Fund Class.

a. Mr. Gilmore's Claims Are Typical of the Claims of the Class of Closed-End Fund Purchasers

Under Rule 23(a)(3), the claims or defenses of the representative party must be typical of those of the class. Typicality exists if each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability. *See In re Am. Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996) ("a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory"). Typicality does not require that there be no factual differences between the class representatives and the class members because it is the generalized nature of the claims asserted which determines whether the class representatives are typical. *See Sprague v. GMC*, 133 F.3d 388, 399 (6th Cir. 1998) ("[t]he premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class"); *Craft v. Vanderbilt Univ.*, 174 F.R.D. 396, 404 (M.D. Tenn. 1996) (typicality may be satisfied "even if there are factual distinctions between the named plaintiffs and those of other class members").

However, the claims of the lead plaintiff need not be identical to the claims of the class to satisfy typicality. *See In re Accredo Health, Inc., Sec. Litig.*, No. 03-2216, 2006 U.S. Dist. LEXIS 97621, at *11 (W.D. Tenn. 2006); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. LaBranche & Co.*, 229 F.R.D. 395, 412 (S.D.N.Y. 2004). Courts have recognized that typicality exists if claims arise from the same event or course of conduct that gives rise to claims of other class members and the claims are based on the same legal theory. *See In re Accredo Health, Inc.*, 2006 U.S. Dist. LEXIS, at *11.

Because Mr. Gilmore's claims arise from the same course of conduct which caused other members of the class to purchase shares of the Closed-End Funds at artificially inflated prices, the typicality requirement is satisfied.

b. Mr. Gilmore Will Fairly and Adequately Represent the Interests of the Class

Rule 23(a)(4) requires that the representative party will "fairly and adequately protect the interests of the class." The PSLRA directs the Court to limit its inquiry regarding adequacy to: (1) whether there are any conflicts between the interests of the movant and the members of the class; (2) whether the movant is an adequate representative of the class; (3) whether the interests of the movant are aligned with the members of the class; and (4) whether there is evidence of any antagonism between the interests of the movant and the class. 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I)(cc). The Sixth Circuit has set forth two criteria for determining adequacy of representation: 1) the representative must have common interests with the unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel. *In re Am. Med. Sys.*, 75 F.3d 1069, 1083 (6th Cir. 1996).

Here, Mr. Gilmore's interests are clearly aligned with the members of the Class, and there is no evidence of any antagonism between him and the members of the proposed Closed-End Fund Class. Mr. Gilmore shares numerous common questions of law and fact with the members of the Closed-End Fund Class in establishing defendants' liability and damages, and his claims are typical of the class. Additionally, Mr. Gilmore has retained competent and experienced counsel who are able to conduct this complex litigation in a professional manner. Thus, the close alignment of interests between Mr. Gilmore combined with his strong desire to prosecute this action on behalf of a class of the purchasers of the proposed Closed-End Funds also militates in favor of granting the instant motion.

C. This Court Should Approve Mr. Gilmore's Choice of Lead and Liaison Counsel

The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to this Court's approval. *See* 15 U.S.C. § 77z-1(a)(3)(B)(v). Courts should not disturb the lead plaintiff's choice of counsel unless necessary to "protect the interests of the plaintiff class." H.R. Conf. Rpt. No. 104-369, at 35, 104th Cong. 1st Sess. (Nov. 28, 1995).

Mr. Gilmore has retained the law firm of Kaplan Fox to serve as lead counsel and The Fowler Law Firm as liaison counsel. Kaplan Fox has extensive experience litigating securities class actions and has successfully prosecuted numerous securities class actions on behalf of injured investors. *See* Fowler Decl. Ex. D (firm resume of Kaplan Fox). The Fowler Law Firm has extensive experience in litigating cases in this district. *See* Fowler Decl. Ex. E (firm resume of The Fowler Law Firm).

IV. CONCLUSION

For the above reasons, Mr. Gilmore respectfully requests that the Court: (1) appoint him as the lead plaintiff in the action on behalf of persons who purchased shares of the Closed-End Funds; and (2) approve his choice of Lead and Liaison Counsel.

Dated this 2nd day of July, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of (i) Notice of Motion and Motion of Joseph W. Gilmore for (1) Appointment as Lead Plaintiff; and (2) Approval of Lead Plaintiff's Choice of Lead and Liaison Counsel; (ii) Memorandum of Law in Support of the Motion of Joseph W. Gilmore; (iii) Declaration of Charles Wesley Fowler in Support of the Motion of Joseph W. Gilmore; and (iv) [Proposed] Order has been served via the U.S. District Court for the Western District of Tennessee's Electronic Filing System and on non-ECF users by United States mail, postage prepaid, on this 2nd day of July, 2010, on the following:

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